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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Rulemaking to Amend Parts 1, 2, 21, 25) CC Docket No. 92-297
Of the Commission's Rules to Redesignate)
The 27.5-29.5 GHz Frequency Bands, To)
Reallocate the 29.5-30.0 GHz Frequency)
Band, To Establish Rules and Policies for)
Local Multipoint Distribution Service)
And for Fixed Satellite Services)
)
Application for Review of the Wireless)
Bureau's September 25, 1997 Public Notice)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO THE COMMISSION:

JOINT APPLICATION FOR REVIEW

WebCel Communications, Inc. ("WebCel"), LBC Communications, Inc., ("LBC") and Zip Communications, Inc. ("Zip"), (together, "Joint Applicants") by their attorneys and pursuant to 47 U.S.C. § 155(c)(4) and Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, hereby seek Commission Review of the September 25, 1997 Public Notice in this docket,¹ issued under delegated authority by the Wireless Telecommunications Bureau, setting December 10, 1997 as the date for commencement of the Local Multipoint Distribution Service ("LMDS") auction as well as establishing all relevant pre-auction deadlines.

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¹ Auction of Local Multipoint Distribution Service, Public Notice (DA-97-2081) (rel. Sept. 25, 1997) ("Auction Notice").

BACKGROUND

For most of the four years, three NPRMs, and two orders preceding the Commission's *Second Order on Reconsideration* in this docket,² installment payments were proposed as a central component of the Commission's effort to "further the Congressional mandate to provide [auction]opportunities for designated entities."³ On March 13 of this year the Commission released its *Second Report & Order* in this docket⁴ adopting installment payments for small businesses bidding for LMDS licenses. It did so "[i]n order to promote the innovation that small businesses can bring to the development of LMDS."⁵

On September 12, the Commission released the *Second Order on Reconsideration*, which eliminated installment payments as a designated entity preference for LMDS. On September 25, the Wireless Telecommunications Bureau gave official notice of commencement of the LMDS auction on December 10, and set November 17 as the date for filing short form applications by those intending to bid.⁶

² *Second Order on Reconsideration*, Rulemaking to Amend Parts 1, 2, 21, 25 of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Bands, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services (CC Docket No. 92-297) (rel. Sept. 12, 1997), 62 Fed. Reg. 48786 (Sept. 17, 1997) ("*Second Order on Reconsideration*").

³ *The FCC Report to Congress on Spectrum Auctions*, FCC Wireless Telecommunications Bureau at 27 (rel. Oct. 9, 1997).

⁴ *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, to Amend Parts 1, 2, 21, 25 of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Bands, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services (CC Docket No. 92-297) (rel. Mar 13, 1997) ("*Second Report and Order*").

⁵ *Id.* ¶ 348. Installment payments are based on the common sense economic principles that: (1) the introduction of new entrants, including small businesses, into the traditionally closed local telecommunications services industries provides a pro-competitive effect of significant value to consumers, (2) the cost-of-capital to DEs is significantly higher than for larger companies, (3) DEs face access-to-capital challenges that larger companies do not, and (4) the purchase of any asset should be financed over the course of its useful life. The Commission used installment payments in six previous auctions, including PCS, IVDS, MDS, 900 MHz SMR and the broadband PCS C and F-blocks. By its own account, installment payment plans, coupled with bidding credits, "have resulted in new opportunities for small businesses to offer spectrum-based services" and are a "useful tool for small businesses to access capital. *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, WT Docket No. 97-82, ¶ 34 (rel. Feb. 28, 1997).

⁶ *Auction Notice* at 1, 9.

DISCUSSION

In its September 25 *Auction Notice*, the Wireless Bureau set a date for commencement of the LMDS auction barely 90 days from the Commission's order on reconsideration eliminating installment payments. The deadline for Form 175s, in which bidders are required to disclose, *inter alia*, their affiliates, controlling principles and gross revenues,⁷ is barely two months after issuance of the reconsideration order.

Joint Applicants have long supported an early date for an LMDS auction,⁸ and continue to support commencing the auction at the earliest reasonable time. However, the Commission's sudden elimination of installment payments on September 12 has fundamentally altered the amount of capital designated entities ("DEs") need to raise prior to the commencement of the auction in order to participate meaningfully. Even with the addition of a new Very Small Business category and an increased bidding credit of 45%,⁹ the elimination of installment payments increases by nearly four-fold the amount that Very Small Business DEs will be required to pay the Commission upon issuance of LMDS licenses.¹⁰ Thus, while previously DEs could largely focus their initial financing plans on funding working capital and system buildout, with the elimination of installment payments, DEs now must scramble to factor-in additional

⁷ 47 C.F.R. § 101.1109.

⁸ See, e.g. Opposition and Comments by Zip Communications on Petition for Reconsideration, CC Docket 92-97 at 2 (July 2, 1997).

⁹ See *Second Order on Reconsideration* at ¶ 20.

¹⁰ A simple example demonstrates the new amounts that must be raised by DEs: Prior to the Commission's *Second Order on Reconsideration*, for each \$100 bid, a successful DE would actually owe \$75 (due to the 25% bidding credit). Disregarding upfront payment, which is the same in both cases, the DE would be required to raise and deliver immediately to the Commission only its 20% down payment, or \$15 for each dollar bid until the first installment payment was due. After the elimination of installment payments, for each \$100 bid, discounted by the new higher 45% bidding credit, a DE will have to pay \$55 upon issuance of the license, or almost four times the amount that would have previously been due.

financing for this four-times increase in the amount due the Commission upon issuance of the licenses.

In the *Second Report and Order*, the Commission established substantial penalties for default on the balance due to the Commission for LMDS licenses.¹¹ As the Commission explained in the *Competitive Bidding Second Report and Order*, imposing default penalties will ensure that potential bidders will “make sure of their qualifications and financial capabilities before the auction.”¹²

Unlike large bidders--who have existing lines of credit, the ability to float commercial paper or to obtain bridge financing--DEs, as the Commission has repeatedly recognized, face significant access-to-capital barriers, which impede their ability to arrange the additional, substantial financing required by the September 12 elimination of installment payments. Thus, the time-frame between the auction and the elimination of installment payments is simply unreasonably short, and will hamper the ability of designated entities to meet the Commission’s expectation that bidders “make sure of their . . . financial capabilities” to pay for the balance due on the licenses won at auction and Congress’ goal of small businesses providing meaningful competition in the provision of new telecommunications services.

Accordingly, in order to allow DEs a reasonable period of time to adjust their financing plans and capital structure, Joint Applicants respectfully ask that the Commission, consistent with its admonishment in the *Competitive Bidding Second Report and Order*, push back the start

¹¹ *Second Report and Order* at ¶ 333.

¹² *Second Report and Order*, Implementation of Section 309(j) of the Communications Act-Competitive Bidding (PP Docket No. 93-253) (rel. Apr. 20, 1994), 9 FCC Rcd at 2382, (emphasis added) (*Competitive Bidding Second Report and Order*”).

date of the LMDS auction, as well as all pre-auction deadlines, by 60 days. Joint Applicants believe that this modest change will provide DEs with sufficient time to adjust to the substantial capital change brought about by elimination of installment payments, without unreasonably delaying the auction and the resulting introduction of an important new source of competition to the public.

The Bureau's decision to schedule the LMDS auction less than 90 days after declaring an end to installment payments is also inconsistent with Congress' recent amendment to the Commission's auction authorization, which directs the Commission to "ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed . . . after issuance of bidding rules, to ensure that interested parties have a [sic] sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."¹³ Congress explained that its purpose in adopting this provision was to "protect against future auctions that attract only a few participants because of insufficient time to gather the information that is necessary for a robust auction."¹⁴ Here, the Bureau has directly jeopardized the possibility of a "robust auction" by giving DEs insufficient time to revise their capital structure due to the late elimination of installment payment financing.

In the end, by establishing an unreasonably early date for the auction relative to the elimination of installment payments, the Commission is doing precisely what Congress has directed it not to do--auction spectrum to under-funded bidders in a climate of uncertainty. For

¹³ 47 U.S.C. § 309(j)(3)(E) (*Emphasis added*).

¹⁴ H.R. Rep. No. 105-149, 105th Cong., 2d Sess. at 567 (1997).

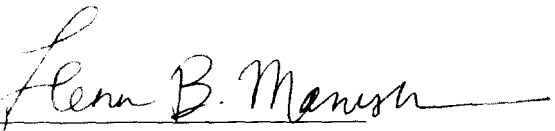
this reason as well, the Commission should delay the start of the auction and all relevant pre-auction deadlines by 60 days.

CONCLUSION

For all these reasons, the Commission should delay the start of the LMDS auction and all relevant pre-auction deadlines by 60 days.

Respectfully submitted,

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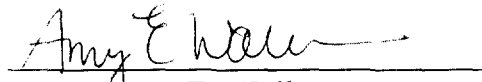
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